

„A Good Constitution” and the Habits of Heart

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2018: Saving the Constitution or Writing an obituary for it ?

While *democracy* tells the story how to gain political power and implement the political agenda, *constitutionalism* puts premium on learning how to govern in the culture of limited government, restraint and responsibility for the common good. 2017 has been a tumultuous year, to say the least, for Poland. Attacks on courts, media, NGOs followed the destruction of the Polish Constitutional Court. All this and more has been well-covered, discussed and parsed through. As a result we know *what* has happened and how. No doubt important reporting on the unconstitutional capture should and will continue in 2018.

This time however, I want to move beyond the dominant narrative of „*what*”, „*how*” and „*here and now*”. Rather, as we move into 2018 I would like to frame the discussion in more universal terms that underline my imaginary concept of „a Good Constitution”. In 2018 and beyond „A Good Constitution” should be the focal point of the struggle to save what is left of the Polish rule of law. For my ambition of going beyond „here and now”, adopting a modern constitution and establishing strong institutions will never be enough to build a true democratic state based on the rule of law. In step with the setting-up of the institutional design, strong liberal narratives must be fostered and habits of the heart built. In 2018 all our individual actions should target the citizens and aim at making sure that they will appreciate the elements of „a Good Constitution” in the battered and humiliated Constitution of 1997.

Putting it differently, a constitution can only play a mobilising and focalising function when it is noticed and understood by the citizens. „A Good Constitution” not only empowers, but also delimits and sets down the boundaries within which power is to be exercised. All underpinned by the most crucial assumption that a constitutional document must remain the higher law to which all other laws must conform and to which ever-changing political constellations pledge allegiance. This is formal element then translates into the substantive one defined in turn by human rights, minority rights, judicial independence. To use A. Barak's words while „free elections are about the *essence* of democracy, the human rights are about democracy's very *existence*.”

Institutional optimism and naivety tested

Eastern Europe is an example of what B. Bugarcic has presciently called „lands-in-between” with the societies torn between „the East” (from which, given the history of the region, they strive to liberate themselves) and „the West” (to which they aspire). The Polish society is a case in point here. 123 years of partition and living without an independent state were followed by 60 years of communism and have left an indelible scar on our public consciousness: disengagement, passivity, low political and constitutional culture and distrust not only towards the state, but also to each another.

The last two years have taught us a very painful lesson of incomplete democratic consolidation and dealt a blow to the institutional optimism that reigned supreme post-1989. The incessant assault on the institutions and the rule of law showed that the text alone is not enough to do the trick. We might have thought otherwise in 1989 and hoped that people would catch up with the institutional and normative changes. Today and with the benefit of hindsight we know that the elites were naive and put too much stock in the transformative power of the law. The acknowledgement now of the limits in the top-down approach is crucial. Even strongest institutions must crumble when they are not backed up by popular support and understanding why they matter in the first place. Only then will we be able to stave off future (PIS is far from done ...) attempts of capturing the state and the top-down imposition on citizens of one and only correct vision of good life. A citizenry that is informed and active will scuttle such attempts even when institutions crumble and are missing.

„A good constitutional document“ has a crucial role to play in this process. What is in the name then?

From the Constitution as an *aspiration*...

The commitment we owe to a constitutional document is anchored in the past, developed and refined in the present and carried over into the future. This is so because a constitutional document has its past, present and future. These three temporal dimensions are linked by the rationale of the underlying principles of values. Principles and values that make up the constitutional identity must be interpreted so as to ensure both the continuity of the messages contained therein and their durability. What is needed is the compromise and equilibrium between necessary change that embraces *The New* and the stability that caters to *The Tradition*. The latter enables us to move forward and set our gaze on the future while not forgetting about the past and about the places we come from.

In other words, constitutional interpretation must strive both for the conservative (preserving the values) and the reformative (reading these in the light of ever-changing circumstances). Future will then emerge at the intersection of both dimensions: looking back and staying in the present. The temporal understanding underscores aspirational function of a constitutional document. It aspires to reflect “us” in the best, and not perfect, way. It aspires to capture this reflection, and yet it will never achieve this goal in a definite and final way, since the “we” not only changes and evolves along with the document, but also is always constrained by the baggage of the past.

... to the Constitution as *pacting*

This never-ending meandering between the past and the future is a matter of constitutional reflection and politics. Such pacting must be undertaken by each generation which has its own distinctive role to play in spelling out what the constitutional pact mandates today. Constitutional fidelity underpins this process and arises at the interstices of practice, text, interpretation and culture.

It is in this sense that constitutional fidelity is about a generational reading of the document. It is not about uncritical iconoclasm. It is about pragmatic recognition that our constitutional allegiances are shaped, reshaped, reexamined as we move forward and as the world around the constitution changes and fluctuates. There is no place for fear of failure, because failure is the part of the fidelity as no Constitution is perfect. Fidelity is about the journey and the process, rather than a boat and final destination. The past must be the key to the future, but not only. Each generation should build on the best of the past and move forward with this baggage.

Constitutional pacting is at its best when people (not only lawyers!) see themselves as being part of the process that the constitution embodies *from* nation-building *through* nation-discovery *to* nation-sustaining and growth. Fidelity is not about logic, but first of all about sense of belonging, emotions, tradition and history. Only the combination of these factors is able to define the contours, and, finally, the durability of and our fidelity to the Constitution and give us a chance moving forward as a nation of all, and not only chosen ones.

True constitutional fidelity never comes down as a blessing from the powers that be, but is born and thrives always in peoples' hearts. Our fidelity to the Constitution should be an expression of loyalty to the great moments of our history and the past that is marked by a plurality of voices and respect for the Other in the best Polish tradition of openness and tolerance. The 1997 Constitution is only part of this tradition. Rule of law, democracy, freedoms and rights, a functioning system of judicial protection, a constitutional court with a strong record of human rights protection and rule of law, all are built on the tradition of limited government, separation of powers, centrality of the individual and the respect for the self-imposed rules that had been a staple of the Polish constitutional narrative and on which the Polish Constitution now builds.

Constitution as a context

Last but not least: „a Good Constitution” not only engages with aspiration and pacting. It must also be able to command respect via constitutional context. „A Good Constitution” obtains when it helps build a constitutional context defined by a myriad of acts of application by lower courts and administration in individual cases. Once citizens start seeing that their constitutional rights and freedoms are real and effective (*context*), and not merely illusory (*text*), and that courts translate the text into context, important transformation will happen. They will not only be inclined to stand for a constitution, but most crucially, they will defend „their Constitution” and „their institutions”.

A constitution is well-designed to ensure stable democracy when the elites project meets, and is enforced, by what S. Levitsky and D. Ziblatt, call „strong informal norms” and practices that prevent the democracies from self-destructing. They argue that „like a pickup basketball game without a referee, democracies work best when unwritten rules of the game, known and respected by all the players, ensure a minimum of civility and cooperation. Norms serve as the soft guardrails of democracy, preventing political competition from spiralling into a chaotic, no-holds-barred conflict”.

A Constitution is good for citizens not because it promises the moon or engages with the

strategy of generous give-away (by the way this was an underlying assumption of communist paper constitutions that promised a lot yet never delivered ...). „A Good Constitution” protects citizens against the arbitrariness of the authorities. Unless we want to complete an obituary for the rule of law in 2018, the challenge should be clear. While improving constitutional safeguards against the excesses of any majority is of utmost importance, it is insufficient. What is needed this time is moving beyond *text* and on to building the *context* in which a constitution will prosper. This context would rely on getting citizens on board of the bottom-up constitutional design, showing them how the institutions work, explaining the importance of the independence of the judiciary and the rule of law and showing how the constitution matters in their daily lives. The constitution strengthened via context would become internalised in the hearts and minds of the citizenry. Such transformation would serve as the best safeguard against any authoritarianism-prone governments and parliaments.

Habits of the heart, Pipe dream or necessity?

Democracy thrives on many voices and constitution is a reflection of this multiplicity. Strongest institutions must fall when the citizenry does not understand why the institutions are important in the first place. As important as studying regimes is, it needs to go hand in hand with the study of the attitudes of the people subject to a democratic rule, or with what A. de Tocqueville has elegantly termed “the habits of the heart”.

How they respond to democracy? How do they define it? These are only few questions that must focus our attention now. There is no democracy without democrats, and Polish democracy on the periphery provides an example of a regime the hybridity of which is reinforced by the ambivalent incoherence of the individuals who struggle to internalize all the rules of a democratic game (inclusion, tolerance, respect for the „Other”, constitutional culture). „A Good Constitution” tells the story of the people, provides a generational bridge between the past, present and the future and, ultimately, builds the normative adherence to a Constitution as the supreme law of the land and fosters constitutional fidelity in people’s deeds and minds.

All this takes me back to the Constitution of 1997. It is a Constitution of open society. It gives voice to everyone and manages the omni-present conflict that defines divided societies like the Polish. It has survived because it is based on a compromise among competing world views and invites all to join in the journey. „We, the citizens” must never let PIS, or any other would-be authoritarians for that matter, tell us that it is any different. This constitution deserves to be defended. It is simply „the Good Constitution” that now more than ever needs translation at the level of citizenry.

Of course, as is the case with all human creatures, this Constitution is not flawless, and should never aspire to be such. Maybe it is even better than „*We Poles*” truly are and applies certain idealism to our description and self-understanding. Yet, despite this over-idealistic narrative, citizens should always side with the document of hope, and reject document of fear, exclusion and distrust. As we enter the New Year, the question whether there are strong enough citizens in „*We*” remains an open one, given given the silence and indifference that accompanied the demise of the Polish Constitutional Court in 2016.

Recent protests against the capture of the judiciary do not and cannot change this grim conclusion. The lesson of disengagement and the legacy of the Court must never be forgotten in 2018 and beyond. For this to happen, though, Poland needs now every bit of the elusive, yet crucial, „habits of the heart”.

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